Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

OPPOSITION TO MOTION FOR STAY

Kevin Joseph
Senior Vice President-Regulatory Affairs
Allegiance Telecom
1919 M Street, NW, Suite 420
Washington, D.C. 20036
202/464-1796 (Telephone)
202/464-0762 (Facsimile)

Julia O. Strow
Vice President Regulatory & Legislative Affairs
Cbeyond Communications, LLC
320 Interstate North Parkway, SE Suite 300
Atlanta, GA 30339
678/424-2429 (Telephone)
678/424-2500 (Facsimile)

Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
202/424-7500 (Telephone)
202/424-7645 (Facsimile)

Richard J. Metzger
Vice President Regulatory
Focal Communications Corporation
7799 Leesburg Pike, Suite 850 North
Falls Church, VA 22043
703/637-8778 (Telephone)
703/893-7888 (Facsimile)

Dave Conn
Deputy General Counsel
William A. Haas
Deputy General Counsel
McLeodUSA Telecommunications Services, Inc.
McLeodUSA Technology Park
6400 C Street, S.W.
P.O. Box 3177
Cedar Rapids, Iowa 52406
319/790-6259 (Telephone)
319/790-7901 (Facsimile)

Richard E. Heatter
Vice President, Legal Affairs
Mpower Communications Corp.
175 Sully's Trail, Suite 300
Pittsford, New York 14534
716/218-6568 (Telephone)
716/218-0165 (Facsimile)

Mark Jenn
Manager CLEC Federal Affairs
Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road
Madison, Wisconsin 53717
608/664-4150 (Telephone)
608/664-4185 (Facsimile)

Dated: September 11, 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

OPPOSITION TO MOTION FOR STAY

Allegiance Telecom, Inc., Cbeyond Communications, LLC, Focal Communications, Corp., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., and TDS MetroCom, LLC. ("Commenters") submit this Opposition to the "Joint Petition of BellSouth Telecommunications, Inc., Qwest Communications International, Inc., SBC Communications, Inc., the United States Telecom Association, and the Verizon telephone companies for Stay Pending Judicial Review"[1] of the *Triennial Review Order*.[2]

In considering whether to issue a stay, the Commission should consider four factors:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?.[3]

---

1 CC Docket Nos. 01-338, 96-98, 98-147, Joint Petition for Stay Pending Judicial Review (Sept. 4, 2003).

2 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003) ("*Triennial Review Order*").

3 *Washington Metropolitan Area Transit Company v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C.Cir. 1977), *citing*, *Virginia Petroleum Jobbers Association v. FPC*, 259, F.2d 921, 925 (D.C.Cir. 1958).

For reasons stated below, under application of these standards, the Petition should be denied. Commenters limit these comments to Petitioners' request to stay certain loop, transport, and combination rules adopted in the *Triennial Review Order.*

I. THE PETITION FAILS TO DEMONSTRATE IRREPARABLE HARM

Petitioners' contention that the loop and transport rules result in irreparable injury may be summarily rejected for the simple reason that the new rules significantly and immediately restrict unbundled access to loop and transport UNEs in comparison to current rules, and there is potential for further restrictions within the next year. Therefore, the new loop and transport rules could not result in irreparable injury to Petitioners.

In regard to high-capacity loop UNEs, the Commission eliminated access to OCn loops, restricted access to DS3 loops to two (2) loops per requesting carrier per customer location, and allowed the states to limit unbundling at specified customer locations where states have found no impairment pursuant to triggers that measure the availability or feasibility of alternatives to ILECs unbundled loops at such customer location. If the triggers are not satisfied with respect to DS3 loops and dark fiber, unbundling relief may still be available if the evidence indicates that CLECs are not impaired without access to the facilities.

For UNE transport, the Commission established a maximum number of 12 unbundled DS3 transport circuits that a competing carrier or its affiliates may obtain along a single route. The FCC found on a national level that requesting carriers are not impaired without access to unbundled OCn transport facilities. The Commission made its unbundling analysis subject to a granular specific route analysis by the states based on the availability of wholesale or self-deployed facilities. These substantial limits on the availability of loop and transport UNEs in

comparison to previous rules preclude any finding of irreparable injury or justification for a stay of this aspect of the order.

Similarly, concerning the loop/transport combination referred to as the "EEL," the Commission tightened use restrictions by, for example, apparently abandoning the non-collocation option, and in other respects merely substituted new criteria that are more detailed and that are designed to achieve the same objective of preventing use of loop/transport combinations as a substitute for interstate access service.

More importantly, a criterion-by-criterion examination, such as the one conducted by the Petitioners, misses the whole point of the Commission's approach which is that "when applied in their totality, the criteria we adopt here demonstrate that a requesting carrier has undertaken substantial regulatory and commercial measures to provide local voice service" and this "will ensure that a requesting local carrier is indeed a provider of qualifying service."[4]

In fact, as a package, the new EEL rules, if anything, appear too restrictive rather than the reverse. First, each requesting carrier must have a state certification of authority to provide local voice service. Second, every DS1 circuit must be assigned at least one telephone number, and the carrier must provide 911 or E911 capability to each circuit being obtained as an EEL. This is intended to restrict the use of EELs to only local voice service customers, and immediately eliminates all data circuits that do not obtain dial tone. Third, requesting carriers must also meet four "circuit-specific architectural safeguards."

In the *Triennial Review Order*, the Commission noted that while each criterion on its own may not prevent gaming, they are collectively sufficient to restrict the availability of these UNE

---

4 *Triennial Review Order*, ¶ 598.

combinations to legitimate providers of local voice service.[5] The fact that Petitioners fail to address the efficacy of the new standards as a package, but resort to the artifice of addressing each factor one-by-one, shows that they have not made a serious claim that the new rules could result in irreparable harm.

In any event, even if the Commission's new rules in regard to high-capacity loop and transport combinations led to some revenue loss for ILECs, mere economic injury is not sufficient to support a finding of irreparable harm. Monetary losses for which "adequate compensatory or other corrective relief will be available at a later date" do not demonstrate irreparable harm.[6] Moreover, the "mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."[7]

At best, Petitioners' concerns about the new EEL standards are fanciful and speculative. Objective observers have rejected Petitioners' hysteria. Far from presenting a significant prospect of "flipping" of special access revenues to UNEs, financial analysts have projected that, due to the detailed nature of the architectural standards for use of EELs, only minimal amounts of special access revenue would be affected.[8]

Finally, even if there were some migration to special access, Petitioners have also failed to demonstrate that they will not be adequately compensated for their alleged "economic injury." Petitioners are already being compensated for use of their facilities through TELRIC prices which are designed to compensate them for the forward-looking costs of their facilities. As the Commission found in the *Triennial Review Order*, "the Commission's pricing rules for UNEs

---

5 *Triennial Review Order*, ¶ 600.

6 *WMATC*, 559 F.2d at 843.

7 *WMATC*, 559 F.2d at 843.

8 Dr. Anna-Maria Kovacs/Regulatory Source Associates, LLC, *Telecom Note: FCC's Triennial Review* at 1 (August 22, 2003).

already ensure that competitive LECs are paying appropriate rates for UNEs and UNE combinations, and that incumbent LECs are adequately compensated for the use of their networks."[9]

While the new EEL standards do not comport precisely with any of the proposals made to the Commission by Commenters and, for that reason, Commenters reserve the right with respect to reconsideration or appeal of them, Petitioners have not shown that the new EEL rules will in any respect result in irreparable harm to them.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Commenters stress that they reserve future rights for reconsideration or appeal with respect to all aspects of the *Triennial Review Order*. Nonetheless, and notwithstanding that the Petition should be denied based on irreparable injury alone, the loop, transport, and EEL portions of the *Triennial Review Order* are clearly not unlawful for the reasons provided by Petitioners.

Petitioners argue both that the Commission did not make a finding of impairment for loops and transport and that its finding of impairment was in any event insufficient. Apart from being internally inconsistent, the Commission should summarily reject this claim because Petitioners simply ignore the findings of impairment the Commission made in regard to loops and transport and the overwhelming substantial justification for them. In regard to high-capacity loop and transport facilities the Commission found impairment based on the huge sunk costs in deploying loop facilities, the inability to obtain reasonable and timely access to customer's premises, both in laying the fiber and getting access to the building, as well as convincing customers to put up with the attendant delay of six to nine months to deploy the facilities.[10] In

---

9 *Triennia Review Order*, ¶ 582.

10 *Triennial Review Order*, ¶ 304.

regard to dark fiber loops, the Commission noted similar impediments to deployment as for high-capacity loops, and, in addition, noted the tremendous advantage that ILECs have in deploying excess fiber given their "first mover" advantage.[11] The Commission found national impairment in regard to high-capacity loop facilities because there was "limited record evidence of self-deployment."[12] In regard to transport facilities, the Commission also found a national level of impairment based on the fact that competitive carriers face substantial sunk costs and that competitive facilities are not available in a majority of locations.[13] The Commission found that to self-deploy transport facilities, competitors face substantial collocation costs, fiber costs, costs of deploying fiber, costs of optronics, and obtaining access to rights-of-way.[14] In short, the Commission made a well reasoned and well supported finding of impairment for loops and transport.

Moreover, as noted, in contrast to previous rules, the Commission significantly restricted the availability of loops and transport and provided for further restrictions based on state findings applying the Commission's granular tests. Thus, the Commission required that states examine the circumstances in their particular markets.[15] If a state finds that the self-provisioning or competitive wholesale triggers are met, the state commission is to lift the unbundling obligation.

---

11 *Triennial Review Order*, ¶ 312.

12 *Triennial Review Order*, ¶ 323.

13 *Triennial Review Order*, ¶ 360.

14 Petitioners based their argument against unbundling on the claim that 49 of the top 50 MSAs have five or more transport providers. This figure proves nothing, however, because the providers may not serve the majority of the routes in a particular MSA. That is why the Commission went deeper than a MSA analysis and determined that point-to-point routes are the relevant indicator. Even if there are competitive alternatives on a point-to-point route, the competitive alternative may not mirror the market the CLEC serves. Thus, the CLEC would have to utilize multiple providers thereby increasing its costs and diminishing service quality. *Triennial Review Order*, ¶ 373.

15 The Act specifically allows state commissions to establish access and interconnection regulations of local exchange carriers. 47 U.S.C. § 251(d)(3). The role the states have been assigned is no more extraordinary than the role the states have conducted since the implementation of the 1996 Act. For seven years, the states have applied the Commission's unbundling and pricing rules. This role conforms with the requirements of the Act, and, in fact, is true to the dual jurisdictional system the Act created.

Even if the triggers are not met, a state commission is required to consider whether other evidence demonstrates that a requesting telecommunications carrier is not impaired without access to an unbundled DS3 or dark fiber loop at a specific customer location based on potential deployment. The Commission did this to ensure that not only "actual" competitive deployment was examined, but the potential for competitive deployment was considered. Thus, a state commission could conceivably lift an unbundling obligation even if there was not sufficient actual competitive deployment to meet the trigger.

While Petitioners would have preferred an unbundling analysis that produces a sweeping immunity from unbundling for loops and transport, and while Commenters specifically reserve rights with respect to these issues, Petitioners do not present any basis to believe that the approach adopted by the Commission does not comport sufficiently with the Act and relevant court decreums to warrant a stay.

Further, in large part, Petitioners' complaints about the loop and transport unbundling approach adopted by the Commission are no more than the tired and shopworn arguments concerning special access pricing flexibility that have already been rejected by the Commission. Thus, Petitioners contend again that grant of pricing flexibility should be considered equivalent to a finding of non-impairment. The Commission has noted repeatedly, however, that the pricing flexibility analysis is not a surrogate for an impairment analysis. The Commission observed that RBOCs have obtained pricing flexibility largely based on the special access revenue trigger that requires only a single collocated competitor and the purchase of some special access in a concentrated area. Thus, this trigger provides "little indication that competitors have self-

deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers."[16]

In any event, Petitioners' arguments concerning pricing flexibility are without merit because, after obtaining pricing flexibility for special access services, none of the ILECs have reduced their special access rates, and some have, in fact, increased their rates.[17] ILEC special access rates are now nearly twice the economic costs.[18] These price increases for special access demonstrate ILEC dominance in loop and transport facilities rather than the existence of significant facilities-based competition.

The reality is that high-capacity loop and transport facilities are precisely the type of UNEs that are hard to duplicate and for which unbundling is appropriate and necessary. The Supreme Court explicitly referenced loop facilities as hard-to-duplicate facilities for which unnecessary competitive provisioning would be wasteful.[19] As the Commission noted, "transmission facilities connecting ILEC switches and wire centers are an inherent part of the ILECs' network that Congress intended to make available to competitors under Section 251(c)(3)."[20] Thus, if there are elements for which the Commission could easily defend broad unbundling obligations, loops and transport facilities are those elements. Despite this, however, the Commission narrowed unbundled access to these elements. For these reasons, Petitioners have not shown that they are likely to prevail on the merits concerning loops and transport.

---

16 *Triennial Review Order*, ¶ 397.

17 CC Docket No. 01-338, AT&T Comments at 139 (April 5, 2002).

18 AT&T Comments at 140.

19 *See, Verizon Communications, Inc., et al., v. Federal Communications Commission, et al.*, 122 S.Ct. 1646, 1672, n. 27 (2002)(emphasis in original).

20 *Triennia Review Order*, ¶ 366.

The Petitioners have also failed to establish any likelihood of success on the merits concerning the new EEL standards. Petitioners' concerns are speculative and unsupported. They make no attempt to address the efficacy of the new standards as a package. If anything, the Commission erred in making the new standards more restrictive than necessary in certain respects. There is also no basis for Petitioners' argument that restrictions on EELs are statutorily mandated. Rather, once the Commission has determined pursuant to Section 252(d)(2)'s access standards that a network element should be unbundled, Section 251(c)(3) requires ILECs to provide nondiscriminatory access to such network element in a manner that allows requesting carriers "to combine such elements" in order to provide any "telecommunications service" they choose to offer.[21] Nothing in the plain language of Section 251(c)(3) requires that use restrictions be imposed on EELs. While Petitioners' request for stay of the EEL standards should be rejected, Commenters specifically reserve their rights with respect to whether any such restrictions are lawful under the Act.

It is also worth noting that the policy reasons that the Commission used to initially justify these "temporary" restrictions have been fully satisfied. Specifically, the Commission justified these restrictions in order to preserve universal service funding implicit in ILEC interstate access charges. However, the *CALLS Order* purportedly removed from interstate access charges all implicit support for universal service.[22] The Commission has already noted that commingling

---

[21] 47 U.S.C. § 251(c)(3). Section 215(c)(3) imposes upon ILECs the "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . [and to] provide such elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[22] *Access Charge Reform*, CC Docket Nos. 96-262, Sixth Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users,* CC Docket No. 99-249, Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 11th Report and Order, FCC 00-193, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

restrictions are not needed to protect its universal service and access charge policies.[23] Therefore, at a minimum, the Commission should have considered easing or eliminating EEL restrictions, rather than reinvigorating them in a new form.

There is also no reason to believe that the Commission erred in eliminating commingling restrictions. The Commission correctly noted in the *Triennial Review Order* that the Act not only does not prohibit commingling restrictions, but that such restrictions place CLECs at a discriminatory disadvantage by forcing them to operate two separate networks – one dedicated to local service and one dedicated to long distance.[24] As the Supreme Court noted in *Verizon* when commenting on the Commission's combination rules, the intent of the rules is to place the CLEC on "equal footing" with the ILEC, and such an intent is consistent with the "Act's goals of competition and nondiscrimination."[25] Further, commingling is an economic and practical necessity where Petitioners have succeeded in eliminating the availability of loop and transport UNEs. Therefore, the Commission was correct to abolish commingling restrictions.

III. A STAY WOULD HARM CLECs AND THE PUBLIC INTEREST

Petitioners' view expressed here and elsewhere that a stay of the rules would, in light of *USTA,*[26] leave no rules in place is questionable at best.[27] Even if that were the case, the previous rules would in any event be the best guide for implementing ILECs' statutory unbundling obligations. Nonetheless, regardless of whether a stay of other portions of the *Triennial Review Order* would be meritorious, a stay of the specific loop, transport, and EEL portions of the *Triennial Review Order* about which Petitioners complain would not serve any useful purpose at this point. A stay of these rules would, at a minimum, prolong regulatory uncertainty. Instead,

---

23 *Triennial Review Order*, ¶ 583.

24 *Triennial Review Order*, ¶ 581.

25 *Verizon*, 122 S.Ct. at 1687.

26 *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C.Cir. 2002).

the Commission should move forward with the loop, transport, and combination rules that Petitioners complain about, subject to the possibility of reconsideration and appeal. This would at this point best serve the pro-competitive goals of the Act and the public interest.

IV. CONCLUSION

The Commission should deny the Petition.

Respectfully submitted,

Patrick Donovan (by HB)

Kevin Joseph
Senior Vice President-Regulatory Affairs
Allegiance Telecom
1919 M Street, NW, Suite 420
Washington, D.C. 20036
202/464-1796 (Telephone)
202/464-0762 (Facsimile)

Julia O. Strow
Vice President Regulatory & Legislative Affairs
Cbeyond Communications, LLC
320 Interstate North Parkway, SE Suite 300
Atlanta, GA 30339
678/424-2429 (Telephone)
678/424-2500 (Facsimile)

Richard J. Metzger
Vice President Regulatory
Focal Communications Corporation
7799 Leesburg Pike, Suite 850 North
Falls Church, VA 22043
703/637-8778 (Telephone)
703/893-7888 (Facsimile)

Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
202/424-7500 (Telephone)
202/424-7645 (Facsimile)

---

[27] *Triennial Review Order*, ¶ 705.

Dave Conn
Deputy General Counsel
William A. Haas
Deputy General Counsel
McLeodUSA Telecommunications Services, Inc.
McLeodUSA Technology Park
6400 C Street, S.W.
P.O. Box 3177
Cedar Rapids, Iowa 52406
319/790-6259 (Telephone)
319/790-7901 (Facsimile)

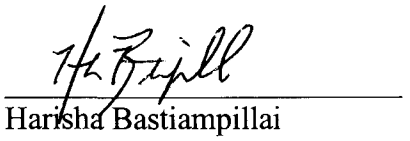
Richard E. Heatter
Vice President, Legal Affairs
Mpower Communications Corp.
175 Sully's Trail, Suite 300
Pittsford, New York 14534
716/218-6568 (Telephone)
716/218-0165 (Facsimile)

Mark Jenn
Manager CLEC Federal Affairs
Peter R. Healy
Manager CLEC External Relations
Regulatory & Corporate Counsel
TDS Metrocom, LLC
525 Junction Road
Madison, Wisconsin 53717
608/664-4150 (Telephone)
608/664-4185 (Facsimile)

Dated: September 11, 2003

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on September 11, 2003, I caused to be served upon the following individuals a copy of the foregoing Opposition to Motion to Stay in CC Docket Nos. 01-338, 96-98, and 98-147.



Harisha Bastiampillai

Via ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Via Electronic Mail

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
Qualexint@aol.com

Via First Class Mail:

Michael K. Kellogg
Mark L. Evans
Sean A. Lev
Colin S. Stretch
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

William P. Barr
Michael P. Glover
John P. Frantz
Edward Shakin
Kathleen Grillo
Verizon
1515 North Court House Road
Fifth Floor
Arlington, VA 22201

Sharon J. Devine
Robert B. McKenna
Craig Brown
Qwest Communications International, Inc.
1801 California Street, 51st Floor
Denver, Colorado 80202

James D. Ellis
Paul K. Mancini
Joseph E. Cosgrove, Jr.
SBC Communications, Inc.
175 East Houston Street
San Antonio, Texas 78205

Gary L. Phillips
Christopher Heimann
SBC Communications, Inc.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005

Charles R. Morgan
James G. Harralson
Jonathan B. Banks
Theodore R. Kingsley
Lisa S. Foshee
BellSouth Corporation
1155 Peachtree Street, N.E., Suite 1800
Atlanta, Georgia 30309

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle
United States Telecom Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005